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IN THE
SUPREME COURT OF THE UNITED STATES

SEMPRA GENERATION, *ET AL.*, PETITIONERS,
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*, RESPONDENTS.

MORGAN STANLEY CAPITAL GROUP INC., *ET AL.*,
PETITIONERS,
v.
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY WASHINGTON, *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITIONS FOR WRIT OF *CERTIORARI*

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I. INTEREST OF AMICUS CURIAE

This brief *amicus curiae* in support of the petitions is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for Petitioners and Respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Interstate Natural Gas Association of America ("INGAA") is a trade organization that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America.[1] INGAA represents virtually all of the interstate natural gas transportation pipeline and interstate natural gas storage companies operating in the U.S., as well as comparable companies in Canada and Mexico. Its members transport over 95 percent of the nation's natural gas through a network of 180,000 miles of pipelines. INGAA and its individual members have a substantial interest in contract stability, continued investment in energy infrastructure, and in ensuring predictable, rational and fair law and policy affecting natural gas transportation.

INGAA supports the petitions for a writ of *certiorari*. *Public Utility District No. 1 of Snohomish County Washington v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*Snohomish*") and *Public Utilities Commission of the State of California v. FERC*, 474 F.3d 587 (9th Cir. 2006) ("*Cal PUC*") are two Ninth Circuit companion decisions addressing the Federal Energy Regulatory Commission's ("FERC") market-based rate regime for

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than INGAA made a monetary contribution to the preparation or submission of this brief.

power marketers. These decisions have implications for FERC's market-based rate policy for interstate natural gas pipeline transportation and storage providers. These decisions may also affect other pipeline rate methodologies.

The Natural Gas Act, 15 U.S.C. § 717 *et seq.* (2000) ("NGA"), as interpreted by this Court, does not mandate any particular type of ratemaking for interstate transporters. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). Rates charged by INGAA members present a broad spectrum of all the rate-setting methodologies permitted under FERC's regulations. INGAA-member rate methodologies include traditional cost-of-service rates, market-based rates (usually premised on an absence of market power), and a number of variations based on individual negotiations, discounts, and rates achieved through settlement. Most interstate natural gas transporters (which term includes pipelines and storage) charge rates that are cost-based or are based upon cost-based rates,[2] and that are directly filed with and subject to review by FERC.

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[2] Interstate natural gas transporters traditionally charge rates based upon the cost of constructing and maintaining the transportation facility plus a FERC-regulated rate of return. FERC has also long permitted interstate natural gas transporters the opportunity to offer "discounted rates." *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987) ("*AGD*"). Discounted rates are the transporter's cost-based rates minus any non-discriminatory discount needed to meet competition. Interstate transporters are also allowed to enter into "negotiated rate" agreements with their customers, as long as the transporter also offers cost-based maximum "recourse rates," which the customer can choose as an alternative if negotiations are not successful. Thus, negotiated rates can only be charged when the shipper has a cost-based alternative

The interstate natural gas pipeline industry is one of the United States' most capital-intensive industries, and one of the few industries that remains subject to public utility-type economic regulation. To underwrite needed investment, it is critically important to project sponsors that long-term contracts can be relied upon to assure eventual cost recovery over the life of the project. Such reliance might be misplaced where buyers are favored over sellers in contract disputes, and where contracts and market-based rate authority are subject to *post hoc* second-guessing.

There are factual and legal differences between market-based rates charged by power marketers and market-based rates charged by interstate pipelines and storage providers. The authority for, and use of, such pricing mechanisms are very different between industries.[3] These factors arguably render *Snohomish*

Ftn. cont'd.
and the shipper has chosen negotiated rates. In contrast, market-based rates are set entirely by the market. The cost basis of the service is not assessed, no recourse rate is stated in the tariff, and the shipper is not offered a cost-based alternative. *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996).

[3] Sellers of natural gas transportation and storage services, as well as sellers of electric power, who want market-based rate authority must make individualized showings that they lack market power with respect to specific facilities and relevant product and geographic markets. However, electric power sales at market-based rates are made by numerous sellers that may or may not own or control physical generating or transmission facilities. In contrast, natural gas transporters sell transportation service rather than a commodity and always own or lease physical facilities, which tend to limit their

and *Cal PUC* inapplicable to contracts between FERC-regulated interstate transporters and their customers. There are even more significant differences between market-based rates and the other rate methodologies—such as traditional cost-of-service, negotiated and discount rates—employed with respect to interstate pipelines.

Despite the distinctive factual and regulatory characteristics of natural gas transportation services, the uncertainties and risks created by the *Snohomish* and *Cal PUC* decisions are of concern to natural gas transporters. The holding in *Snohomish* and *Cal PUC* is broadly stated and confusing. The uncertainty created by the asymmetric treatment and the *post hoc* revisions of contracts could, therefore, have adverse effects on market-based rates in other contexts.

Ftn. cont'd.
relevant markets and may make the requisite showing that they lack market power more rigorous at the outset. Consequently, almost all natural gas transporters holding market-based rate authority are relatively new natural gas storage providers. Also distinguishing natural gas transporters from market-based rate sellers of natural gas or electric power is the clear Congressional intent to increase the usage of market-based rates for interstate natural gas storage providers. Section 312 of the Energy Policy Act of 2005 ("EPAct 2005"), Pub. L. No. 109-58, § 312, 119 Stat. 594, 688 (2005) which adds a new section 4(f) to the NGA, permits FERC to approve certain natural gas storage projects at market-based rates even without a "no-market-power" showing, and reflects a Congressional mandate that sellers of electric power and natural gas do not possess.

II. STATEMENT OF THE CASE

The facts below, and the implications of the Ninth Circuit's decisions for sellers of electric power at market-based rates, have been thoroughly discussed in the petitions for *certiorari* and will not be repeated here. This *amicus* brief supplements the Petitioner briefs with an additional perspective drawn from the interstate natural gas pipeline and storage industry. INGAA's focus is on two specific errors: (1) the Ninth Circuit's asymmetric treatment of buyers and sellers under its interpretation of the *Mobile-Sierra* Doctrine and (2) the Ninth Circuit's *post hoc* reevaluation of contracts entered into pursuant to final and effective market-based rate authorizations, based upon an after-the-fact review of facts in existence at the time the contracts were executed.

III. SUMMARY OF THE ARGUMENT

In the *Snohomish* and *Cal PUC* decisions, the Ninth Circuit addressed complaints that sought to modify, after-the-fact, long-term contracts executed in prior years. FERC had carefully considered the facts surrounding contract formation and had rejected those complaints, holding that the complaints were precluded under the public interest standard established pursuant to *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the "*Mobile-Sierra* Doctrine"). In remanding these FERC orders, the Ninth Circuit decisions fundamentally alter the *Mobile-Sierra* analysis by creating an unequal or asymmetric test for setting aside contracts under *Mobile-Sierra*. The Ninth Circuit's decisions create an asymmetric test under *Mobile-Sierra* that favors the interests of the buyer over those of the seller. Such asymmetric treatment of the contracting parties undermines the integrity of long-term contracts,

is economically unsound, contrary to basic contract law, and contrary to the decisions of this Court.

The Ninth Circuit's decisions also erred by allowing improper *post hoc* challenges to existing contracts entered into pursuant to FERC-approved and effective market-based rate authorizations. Even if FERC had initially erred in allowing sellers to utilize market-based rate authority, FERC's market oversight authority must be exercised prospectively. This oversight authority cannot be used to invalidate contracts that were executed prior to the filing of a complaint, and that were entered into pursuant to FERC-approved market-based rate authorization that was effective at the time the contracts were executed. It is analogous to prohibited retroactive ratemaking for the Ninth Circuit to order FERC to entertain such after-the-fact challenges.

The Ninth Circuit's asymmetric treatment of buyer and seller and its improper *post hoc* invalidation of contracts entered into pursuant to FERC-approved market-based rate authority will interject new regulatory risk into the energy industry. This precedent could chill investment and drive up the risk premiums demanded by investors for energy infrastructure projects that are supported by contracts. The Ninth Circuit's decisions raise concerns that years down the line, contracts may be second-guessed under the *Snohomish* and *Cal PUC* precedents. These effects of the Ninth Circuit precedents could drive up costs to consumers and drive down reliability.

IV. ARGUMENT

A. ASYMMETRIC TREATMENT OF BUYERS AND SELLERS IS ECONOMICALLY UNSOUND AND CONTRARY TO THE DECISIONS OF THIS COURT.

1. The Ninth Circuit's rulings require asymmetric application of the *Mobile-Sierra* Doctrine.

The Ninth Circuit's decisions create a new, asymmetric test for setting aside contracts under the *Mobile-Sierra* Doctrine. The decisions modified the *Mobile-Sierra* Doctrine by holding that a remorseful ***buyer*** complaining of rates that are too high can more readily void a valid contract than a remorseful ***seller*** complaining of rates that are too low. The Ninth Circuit held that FERC had committed reversible error by applying the factors articulated in *Sierra*, which involved a seller's complaint about low contract rates (a "low-rate challenge"), to a buyer's complaint about high contract rates (a "high-rate challenge"), *Snohomish*, 471 F.3d at 1087 (citation omitted). The Ninth Circuit said that, in its view, "the key 'public interest' in a high-rate challenge . . . is assuring that the consuming public pays fair rates. . . ." *Id.* at 1089. The Ninth Circuit instructed FERC to accept a **buyer's** challenge to a contract under the public interest test if the contract rates are higher than "a zone of reasonableness" and retail rates would have been lower "had the wholesale contract rates been lower." *Id.* In contrast, in the Ninth Circuit's view, a **seller** must continue to meet a heavy burden before a rate may be changed. "When a customer has negotiated a low contract rate, FERC must meet a high burden before raising that rate." *Id.* at 1088.

Snohomish and *Cal PUC* thus set the stage for the disruption of contracts—by buyers—where buyers later wish to undo their contractual obligations. Undermining the stability of long-term contracts in a way that consistently favors one side over the other, creates new risk and discourages investment. Long-term contracts allow parties to share the many risks of a major investment in energy infrastructure. For example, the commercial viability of facilities over their economic life-span is affected by shifting supply and consumption patterns, as well as competition from other pipelines, storage facilities and other energy sources entering the market. Through sharing major investment risks, long-term agreements underwrite and promote infrastructure construction. Major investment in U.S. energy infrastructure will be needed in the future to meet growing needs.[4] Long-term contracts are important, not just in the context of market-based rates, but with respect to other rate making methodologies, such as traditional cost-of-service rates and increasingly important "negotiated rates."[5]

The *Mobile-Sierra* Doctrine has never before been applied asymmetrically. The Doctrine originated long

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[4] *Strategic Plan For Fiscal Years 2006-2011*, Federal Energy Regulatory Commission 7 (Sept. 2006), *available at* http://www.ferc.gov/about/strat-docs/strat-plan.asp. *See also An Updated Assessment of Pipeline and Storage Infrastructure for the North American Natural Gas Market: Adverse Consequences of Delays in the Construction of Natural Gas Infrastructure*, INGAA Foundation, Inc. 7-8 (2004), *available at* http://www.ingaa.org/cms/31/43/678/45.aspx (estimating that the natural gas transportation industry must invest $61 billion in constant 2003 dollars by 2020 in the U.S. and Canada).

[5] *See* footnote 2, *supra*, for a description of "negotiated rates."

before market-based rates, and the protections it has afforded contracting parties have been relied upon in many other rate-making contexts, including traditional cost-of-service rates (*Wis. Gas Co. v. FERC*, 770 F.2d 144, 166-67 (D.C. Cir. 1985); *Exxon Corp. v. FERC*, 206 F.3d 47 (D.C. Cir. 2000); *Texaco Inc. v. FERC*, 148 F. 3d 1091 (D.C. Cir. 1998)) and discounted rates (*AGD*, 824 F.2d at 1009). The Ninth Circuit's asymmetric "high case-low case" standard for relief under *Mobile-Sierra* could undermine needed investment and is contrary to fundamental principles of contract law, is economically unsound, and is contrary to the decisions of this Court.

2. The asymmetric treatment of buyers and sellers is economically inefficient, and is contrary to fundamental principles of contract law.

A regulatory regime in which long-term contracts can potentially be voided by the buyer increases the risk of "hold up"—one side taking advantage of the other's inability to undo an investment. *See, e.g.*, O.E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 42-51 (1985). The threat of customer "hold-up" could increase financing costs or prevent project financing altogether. The increased risk associated with the possibility that at some point in the duration of a long-term contract the contract might be undone will tend to raise the required return on investment and will tend to reduce investment.

To make matters worse, customers freed of their long-term contractual obligations to pay for service under the principles adopted in *Snohomish* and *Cal PUC* could often continue to use the same utility facilities on what amounts to a firm basis if the facility owner is unable to

line up alternate, long-term users of the facility. Firm contracts underwrite the construction and operation of a pipeline by way of a reservation charge, paid whether or not service is taken, which reservation charge helps to compensate the service provider for the often seasonal nature of its business. JAMES C. BONBRIGHT, *ET AL.*, PRINCIPLES OF PUBLIC UTILITY REGULATION 399-401 (2nd. Ed. 1988). Customers able to void their contractual obligations could take interruptible service without payment of a reservation charge, and under such circumstances the pipeline's full cost would likely not be recovered.

Long-term, enforceable contracts between a creditworthy shipper and pipeline can alleviate risks that the shipper will engage in opportunistic behavior. Such contracts can thereby encourage needed construction. However, utility service providers may be fearful of a future FERC ruling that the market conditions at the time of contract formation were, in hindsight, "dysfunctional" from the perspective of the buyer. Under such circumstances, utility service providers might not invest in infrastructure or might require an added risk premium to compensate for the heightened risk posed by the *Snohomish* and *Cal PUC* precedents. This could be a disincentive to provide new or expanded service where and when market demand indicates that service is most highly valued. In a regime in which regulatory intervention takes place for the benefit of buyers under bilateral contracts, "a natural inference is that suppliers who could otherwise profitably enter will be deterred from entry." *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005). Such after-the-fact intrusion into contracts, especially in a manner designed consistently to benefit the buyer, could "wreak substantial harm—in curtailing price increments

attributable to genuine scarcity that could be cured only by attracting new sources of supply." *Id.*

Under the economically inefficient asymmetric regime established under the Ninth Circuit's rulings, future consumers could be harmed both with regard to prices paid and with regard to reliability of supply. It would be in precisely those situations when scarcity had driven prices their highest and when new supply was most needed by a buyer that a seller would be placed at highest risk that a contract signed under such circumstances would be second-guessed at a later time. In times of scarcity, under the asymmetric application of the *Mobile-Sierra* Doctrine articulated by the Ninth Circuit, the buyer may be left with sellers willing to sell only on an extremely short-term basis or may be left with no seller willing to step forward at all. *See generally* David G. Tewksbury & Stephanie S. Lim, *Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts,* 26 Energy L. J. 437, 469-72 (2005).

The asymmetric treatment of buyers and sellers under a contract also violates fundamental principles of contract law. Changes in cost alone do not excuse contract performance. *See, e.g.*, Uniform Commercial Code, Section 2-615(a) Comment 4. A party's obligation to perform under a contract, based on the emergence of risks that were not foreseen at the time the contract was entered, might conceivably be excused under some factual scenarios, such as impracticability of performance or frustration of purpose. However, the facts of the cases below do not warrant such relief. As shown by the Petitioners, the FERC found that the subject contracts were voluntarily negotiated by sophisticated parties, that entry into the contracts were reasonable at the time, that there was no price manipulation by the sellers, and that there was no contractual basis for voiding the contacts. It is the very essence of a contract that it is directed at the

elimination of some risks for each party in exchange for accepting others. Each party receives the certainty of price, quantity, and time, and assumes the risk of changing market prices, superior opportunity, or added costs.

Protecting a buyer by voiding a contract that the buyer later determines was improvident may offer short-term relief to that particular buyer, but such protection is costly to society in the long run. A central benefit of a contract is the assurance it provides that parties will receive a return for investments that have specific value in their relationship. Without such assurance, a party has a diminished incentive to invest, because that party may ultimately be deprived of its bargain. "Courts that void contracts to provide insurance do so at the cost of reducing the ability to provide incentives for an efficient level of *ex-ante* investment." L. Anderlini, *et al.*, *Courts of Law and Unforeseen Contingencies*, J. Law, Econ. & Org. 2 (Sept. 13, 2006), *available at* http://jleo.oxfordjournals.org/cgi/content/abstract/ewm017v1.

In sum, the Ninth Circuit's asymmetric standard for relief under *Mobile-Sierra* could undermine investment, particularly where investment is most needed, is contrary to fundamental principles of contract law and to the decisions of this Court.

B. THE NINTH CIRCUIT DECISIONS IMPROPERLY REQUIRE FERC TO CONSIDER *POST HOC* CHALLENGES TO CONTRACTS ENTERED INTO PURSUANT TO EFFECTIVE MARKET-BASED RATE AUTHORITY.

The Ninth Circuit's rulings improperly allow after-the-fact challenges to contracts entered into pursuant to an effective FERC-approved market-based rate authorization. In so doing, the Court failed to observe the requirement, analogous to the rule against retroactive ratemaking, that remedies be implemented on a prospective basis. *Snohomish* and *Cal PUC* appear to require FERC to consider retroactive correction of "errors" discovered, in hindsight, by the Court on review. Under the Ninth Circuit's ruling, such a correction can be based upon evidence in existence at the time the contracts are executed and prior to the time a complaint is filed. This is a new and unprecedented holding that, unless corrected, will cause uncertainty that may chill investment and injure not only regulated companies but consumers that rely upon those companies for service.

The Ninth Circuit ruled that "*Mobile-Sierra* cannot apply without a determination that the challenged contract was initially formed free from the influence of improper factors, such as market manipulation, the leverage of market power, or an otherwise dysfunctional market." *Snohomish*, 471 F.3d at 1086. The Ninth Circuit improperly looks back to evidence in existence as of the dates upon which the Petitioners' market-based rate authority was granted and the dates upon which the contracts here at issue were entered, and implies that FERC should set aside those contacts based upon that evidence. *Id.* at 1086-87. In the Ninth Circuit's view, market dysfunction or other problems allegedly affecting

the initial formation of the contract can be revealed in hindsight and in the fullness of time—after the buyer may have derived all benefit from the agreement. This after-the-fact contract abrogation may leave the seller with ancillary contracts and investments that the seller cannot similarly void. The Ninth Circuit's decisions appear to require FERC to entertain *post hoc* contractual challenges and to consider retroactive remedies, based upon market facts already in existence at the time of contract formation. Combined with the asymmetric favoritism toward buyers, this precedent is potentially damaging to service providers and consumers alike.

Generally, remedies are prospective in nature. Changes, if any, to the Petitioners' market-based rate authority may occur only from the dates of a complaint and changes to contracts must be dealt with prospectively as well.[6] If the Court had concerns with the market-based rate authorization, the proper remedy would have been forward-looking changes to the seller's authorizations or to the market oversight process. Such changes would apply on a prospective basis to future market-based rate agreements, but previously executed agreements should not have been invalidated.

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[6] A successful rate challenge under NGA Section 5, 15 U.S.C. § 717d, will result in new rates effective on and after the date the rate ruling becomes final and non-appealable, and no refunds are contemplated. The refund effective date provision under FPA Section 206 was recently amended by Section 1285 of EPAct 2005 to require that, in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint. EPAct 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

As they stand, the Ninth Circuit's decisions appear to authorize remedies based on evidence that dates back to the time of contract formation and market-based rate authorization. The Ninth Circuit's rulings are, in this respect, analogous to retroactive ratemaking, which is proscribed by statute, precedent and long tradition. Section 5 of the NGA and Section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e, both require prospective rate changes when the rate change is not initiated by the utility.[7] The "Commission itself has no power to alter a rate retroactively." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981). This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua v. FERC*, 610 F.2d, 950, 954 (D.C. Cir. 1979). By authorizing only prospective rate changes, the rule against retroactive ratemaking ensures rate predictability. *See Con. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 793 (D.C. Cir. 1990). By preventing discriminatory pricing, these rules promote equity. *See Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999). The Ninth Circuit has failed to consider how its decisions have undermined these policy considerations.

Under the guise of advocating "oversight" of market-based rates, the Ninth Circuit ruling has engaged in a harmful after-the-fact review of valid contracts and lawful grants of market-based rate authority. The Ninth Circuit has called upon FERC to second-guess and possibly to undo contracts and market-based rate

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[7] The FPA establishes a regulatory scheme for electricity paralleling that which the NGA creates for gas. *Sierra*, 350 U.S. at 353.

authority. The Ninth Circuit has instructed that such second-guessing may be based upon market facts already in existence at the time contracts were formed, and has also ruled that FERC must favor the buyer in any such reevaluation. As with the Court's asymmetric application of the *Mobile-Sierra* Doctrine, an unclear precedent which encourages after-the-fact changes to the bargains struck by the buyers and sellers will interject new risk into long-term contracts. Those risks will be particularly great for parties that rely upon their contracts to underwrite major capital investments.

The Ninth Circuit tries to paint a benign face on its holding, saying that it was merely attempting to assure that FERC was adequately overseeing the market and that the sellers' market-based rate authority was not based upon stale data. *See, e.g., Snohomish*, 471 F.3d at 1085. FERC does, of course, have an oversight obligation with respect to all types of rates. The Ninth Circuit has not explained, however, how this obligation would support after-the-fact challenges to contracts validly entered into pursuant to effective, FERC-approved market-based rate authorizations. Even assuming the existence of alleged defects in the market, these problems can only be addressed prospectively.

The Ninth Circuit has acted arbitrarily and capriciously by allowing *post hoc* challenges to valid contracts and final market-based rate authorizations, and by inviting retroactive remedies to resolve these challenges. Along with the asymmetric application of the *Mobile-Sierra* Doctrine, the Ninth Circuit's rulings are contrary to the rulings of other federal circuits, to rulings of this Court, to statute and to rational policy. Granting the writ of *certiorari* requested by the Petitioners would be appropriate in order to correct these errors.

C. THE *CORAL* CASE IS DISTINGUISHABLE AND DOES NOT SUPPORT DENIAL OF *CERTIORARI*.

This Court has recently denied *certiorari* in a facially similar case, *Coral Power, L.L.C. v. California*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S.Ct. 2972 (U.S. 2007) ("*Coral*"). Like the decisions at bar, *Coral* was a Ninth Circuit case that called into question the regulatory certainty of market-based rate electric power transactions. The vital difference, however, is that *Coral*, which grants FERC's retroactive remedial authority with respect to sellers that did not properly report market-based rate transactions, did not revise the *Mobile-Sierra* Doctrine established by this Court and set a new and unclear standard under which buyers would be favored over sellers in contract disputes. Moreover, the decisions now before this Court subject sellers to this new asymmetric standard even if they complied with all of FERC's requirements for obtaining and maintaining market-based rate authority. The cases at bar thus present important legal and policy issues not present in *Coral*. For this reason this Court's recent denial of *certiorari* in that case does not support denying *certiorari* in the cases at bar.

V. CONCLUSION

For the foregoing reasons, this Court should grant the writs of *certiorari* as requested by Petitioners.

Respectfully submitted,

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